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In The

Supreme Court of the United States

In Re: CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.,
Debtor,

CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.
Petitioner,

v.

CAPITAL SKIING CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fourth Circuit Court of Appeals err in upholding the decision of the United States District Court for the Eastern District Court of Virginia, Alexandria Division upholding the decision of the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division failing to accord full faith and credit to a decision of the Warren County Circuit Court holding a foreclosure sale void.

Whether the Fourth Circuit Court of Appeals err in upholding the decision of the United States District Court for the Eastern District Court of Virginia, Alexandria Division upholding the decision of the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division finding that Appellee's "title" was superior to the Appellant even though the Appellee was holding title through a void foreclosure and denying all damages as a result of this wrongful possession that put Appellant out of business.

LIST OF PARTIES

The parties to the proceedings below were Petitioner-Appellant Cherokee Corporation of Linden, Virginia and Respondent-Appellee Capital Sking Corporation. Under Rule 29.6 the Petitioner-Appellant has no parent company and no subsidiaries, either wholly owned or not wholly owned.

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OPINIONS BELOW

This matter began its path through the Federal court system when the Petitioner filed for relief under title 11 of the bankruptcy code. Respondent filed a proof of claim which was objected to and then Petitioner filed a counterclaim. The matter was heard by a bankruptcy judge who on July 1, 1998 entered a memorandum opinion and Order. (App. 4-19). Cherokee Corp of Linden, Inc. v. Capital Skiing Corp. 222 Bankr. 281 (Bankr. E.D. Va.1998) The case was appealed to the United States District Court for the Eastern District Of Virginia where the matter was affirmed without written opinion on November 6, 1998. The Fourth Circuit Court of Appeals affirmed the district court's affirmation of the bankruptcy court's opinion on September 13, 1999 and denied the petition for rehearing en banc on November 22, 1999. (App. 1, 21).

JURISDICTIONAL STATEMENT

The Petitioner, after being heard by the Fourth Circuit Court of Appeals, asks this Court for a Writ of Certiorari. Jurisdiction of this Court is proper under 28 U.S.C. § 1254 and 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Sec. 1738

Sec. 1738 State and Territorial statutes and judicial proceedings; full faith and credit

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Capital Skiing Corporation (hereafter Capski) is a corporation consisting of the four (4) largest lienors of the property known as Cherokee Ski Resort. Cherokee Corporation of Linden, Virginia (hereafter Cherokee) is a corporation that operated the Cherokee Ski Resort. In November 1992 Capski foreclosed, bought in, took possession, chained the entrances and posted the property. On January 20,1995 the Warren County Circuit Court declared that foreclosure sale VOID. On October 4, 1996 Cherokee filed for Chapter 11 bankruptcy relief. Capski filed a proof of claim and Cherokee filed an objection to the proof of claim and a counterclaim. The case went to trial in Bankruptcy Court on December 10, 1997. An Order and memorandum opinion was entered on July 1, 1998. Respondent properly appealed to the U. S. District Court. The District Court entered an Order on November 6, 1998. This Order was properly appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit entered an Order on September 13, 1999 which was reviewed en banc and denied by Order dated November 22, 1999 from which the Petitioner seeks relief.

ARGUMENT

The Petitioner maintains that in his decision in this matter, the Bankruptcy Court judge did not correctly apply either state or federal law. In this matter the Respondent initiated a foreclosure sale of the Petitioner's property. This foreclosure was done extra judicially. As a result of this sale the Trustee attempted to pass title to the property to the respondent. Within the time period permitted by Virginia law, petitioner filed an action in the Warren County Circuit Court challenging the foreclosure. After a complete hearing on this matter the Warren County Judge declared the foreclosure sale void. This decree was not appealed and as such constitutes a final ruling and a valid state court judgment. In the case of Genesys Data Technologies, Incorporated v. Genesys Pacific Technologies Incorporated decided shortly after the petitioner's case the Fourth Circuit Court of Appeals discussed what petitioner feels is a similar situation concerning the federal application of state laws. The Court there stated that 28 U.S.C.A. § 1738 "directs federal courts to afford state court judgments full faith and credit." It states further quoting Kremer v. Chemical Construction Corp., "§ 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the Common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." Then citing Marrese v American Academy of Orthopedic Surgeons, 470 U.S. 373, it set out a two step process in determining the application of § 1738.

> First, a federal court must look to state law to determine the Preclusive effect of the state court judgment. ... If state law would not bar relitigation of an issue or claim decided in the earlier proceeding then the inquiry ends –a federal court will not give the state court

> judgment preclusive effect either. If state law would afford the judgment preclusive effect, however, then a federal court must engage in a second step—it must determine if Congress created an exception to §1738

In this current case it is clear that the judgment of the Warren County Court is final or preclusive. The appeal period having long since expired, as between the parties to this matter the Warren County's judge's decision is the binding law. Further, no statutes or other information could be found to indicate that Congress in any way wanted to except this case. The inescapable conclusion then is that the Trustees sale is void and the "validity of a creditor's claim is determined by rules of state law." Grogan v. Garner, 498 U.S. 279, 283-84. Therefore, Capski's claim must be viewed and evaluated on the basis of a void Trustee's sale.

Void is not a difficult concept to understand, it is extremely basic. Black's Law Dictionary defines Void as "Null; ineffectual; nugatory; having no legal force or binding effect;" Although Virginia has not specifically ruled on the definition of void, this is the definition applied across the country. See Sparks v U.S. D.C. Vt., 153 F. Supp 909, 911; Cummings v. Powell, 8 Tex. 80, 81, 85; Inskeep v. Lecony 1N.J.L., Coxe, 111,112 for examples. The Virginia Courts have held that they will not go beyond the meaning of clear language Seoane v. Drug Emporium, Inc. 249 Va. 269. Yet, the Bankruptcy Judge decided that he had to. In order to reach his desired conclusion he had to ignore the normal definition of the word void and actually treat the matter as if the Warren County judge had declared the matter as voidable.

The Bankruptcy Judge went to great lengths to differentiate the Virginia actions of ejectment and unlawful detainer, deciding that while one might require title the other only required a right to possession. This exercise by the judge was irrelevant. Since the Trustee sale was void he

could pass nothing, not title, not right of possession, nothing. This Honorable Court has held in Mosser v. Darrow 341 U.S. 267, 271

> That which the trustee had no right to do he had no right to authorize and the transaction were as forbidden for the benefit of others as they would have been on behalf of the trustee himself

Here, Judge Peatross found that the trustee did not have good title before the sale and therefore Petitioner maintains that he could not pass what he did not have. If they could then every lender, or creditor, could conduct any type of foreclosure without any concern about repercussions.

It is obvious that the Appellee did not have any right to possession. Using the test quoted by Judge Bostetter in his opinion on pages 8-9 from Daily v. Rucker 151 Va. 72, Cap Ski unlawfully entered and maintained possession of the land without Cherokee's consent and withheld possession from Cherokee. Virginia has held for years that when an owner was forcibly turned out, he had a right for damages in either unlawful detainer or ejectment. Olinger v. Shepard 12 Grat 53 Va. 462 (1855).

All the rulings of Judge Bostetter are based on his mistaken opinion that CapSki had a right to possession. Since he obviously felt, and later incorrectly ruled, that Cap Ski had a right to possession Judge Bostetter made all his rulings based on that incorrect fact.

CONCLUSION

Respondent is before this Court because it has had it's assets taken and it's economic viability destroyed by it's creditors based on a void foreclosure sale. Under this void sale they proceeded to take a man's home, the ability the

Appellant had to earn a income and most, if not all it's assets. These creditors now stand before the Court system and request that they be allowed to do this damage with impunity. They took the course of action knowingly and deliberately and now they wish the liability for their choices to be removed. They could have used the judicial system to accomplish the same ends, but it probably would have taken longer. Respondent asks this Court to give the normal meaning to the words involved here and reverse the holding of the District Court and the Bankruptcy Court and find in it's favor or return the matter to the lower court for a new trial.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2809

In Re: CHEROKEE CORPORATION OF LINDEN, VIRGINIA, INC.,

Debtor.

CHEROKEE CORPORATION OF LINDEN, VIRGINIA, INC.,

Plaintiff - Appellant,

versus

CAPITAL SKIING CORPORATION,

Defendant - Appellee.

ENTERED: September 13, 1999

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-98-1146-A, BK-96-15445-MVB)

Submitted: August 31, 1999 Decided: September 13, 1999

Before MURNAGHAN, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Robert J. Jones, ROBERT J. JONES, P.C., Alexandria, Virginia, for Appellant. John T. Donelan, LAW OFFICES OF JOHN T. DONELAN, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Cherokee Corporation appeals from the district court's order affirming the bankruptcy court's order denying its counterclaims asserted against Capital Skiing Corporation. Our review of the record discloses no reversible error. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CHEROKEE CORPORATION OF LINDEN, VIRGINIA, INC.,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. 98-1146-A
CAPITAL SKIING CORPORATION,	)	
Defendant.	)	

ENTERED: November 6, 1998

ORDER

THIS CASE comes before the Court on the appeal of Cherokee Corporation of Linden, Virginia, Inc. For the reasons stated from the bench, it is hereby

ORDERED that the judgment of the United States Bankruptcy Court is affirmed.

The Clerk is directed to forward a copy of this order to counsel of record.

ENTERED this 6th day of November, 1998.

/s/ Gerald Bruce Lee
Gerald Bruce Lee,
United States District Judge

Alexandria, Virginia
11/6/98

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CHEROKEE CORPORATION OF LINDEN, VIRGINIA, INC., Debtor.	)	Case No. 96-15445 Chapter 11
CHEROKEE CORPORATION OF LINDEN, INC. Plaintiff,	)	Adversary No. 97-1002
v.	)	
CAPITAL SKIING CORPORATION, Defendant.	)	Hon. Martin V. B. Bostetter, Jr. Chief Judge

MEMORANDUM OPINION

Today we consider the counterclaims of Cherokee Corporation of Linden, Virginia, Inc. ("Cherokee") against Capital Skiing Corporation ("Cap Ski") for unlawful detainer, unjust enrichment, tortious interference with prospective business advantage/ tortious and intentional interference with business relationships and punitive damages. This case arises out of nearly six years of litigation both in this court and various state and federal courts concerning ownership of a ski resort and payment of mechanic's liens. The defendant, Cap Ski has filed a proof of claim in the instant case to which the debtor has objected and raised counterclaims. After a hearing was held on September 17, 1997, the court dismissed counterclaims 2, 3 and 7 (constructive trust, negligence and breach of contract respectively) on the grounds that they were barred by *res judicata*. Similarly, at a hearing on November 18, 1997, this

court dismissed counterclaim 5 (statutory and civil conspiracy) also on the grounds of *res judicata.*

A trial was held on December 10, 1997 on the three remaining counterclaims, unlawful detainer, unjust enrichment, tortious interference with prospective business advantage/ tortious and intentional interference with business relationships and punitive damages.

Prior History

Cap Ski is a Virginia corporation whose stockholders consist of corporations that were also the four largest mechanic's lienors of the property known as Cherokee Ski Resort. The mechanic's lienors filed suit against Cherokee in the Circuit Court of Warren County to enforce their mechanic's liens. A consent decree was entered on February 5, 1991 granting judgment in favor of the mechanic's lienors. Cherokee defaulted and the mechanic's lienors sought enforcement of the liens under the consent decree.

On June 7, 1991, Cherokee filed its first Chapter 11 proceeding to stop enforcement of the consent decree. On August 15, 1991, two of the mechanic's lienors filed a motion for relief from the stay seeking leave to proceed with enforcement of the consent decree. On the eve of trial, Cherokee settled and entered into a consent order granting relief from stay. According to the bankruptcy consent order, Cherokee agreed to grant the mechanic's lienors a first deed of trust on the property. A note and deed of trust were executed by Cherokee on March 26, 1992 to secure the bankruptcy consent order.

The bankruptcy consent order provided that Cherokee would have a 10 day grace period to make payments before foreclosure proceedings could begin without further order of the Bankruptcy Court. Cherokee failed to make the payment due on March 31, 1992 and the mechanic's lienors requested the Substitute Trustee, James Drown to commence foreclosure.

On July 24, 1992, the mechanic's lienors assigned their interests in the note and deed of trust to Cap Ski. Eventually, after some delay, a foreclosure sale was held on November 30, 1992 and the property at issue was sold to Cap Ski.

On December 11, 1992, Edward Raney filed suit in the Circuit Court of Warren County. Raney sought to establish title of the Cherokee Resort in himself as opposed to Cherokee. Cap Ski filed an action in ejectment also in the Circuit Court of Warren County. The court consolidated the two actions for trial. The case was resolved in favor of Cap Ski, when the trial court determined that Cherokee, not Raney, was the legal owner of the ski resort. The final decree was entered in both cases on November 9, 1993.

On November 30, 1993, Cherokee and Occoquan with others filed an action at law in the Circuit Court of Warren County claiming that the trustee's sale had been improperly conducted and asserting various claims against Cap Ski. The circuit court bifurcated the action into a chancery issue and an action at law.

On January 20, 1995, the circuit court determined that the conveyance to Cap Ski at the foreclosure sale was void and title to the property reverted to Cherokee. However, the court granted the Trustee authority to readvertise and conduct another foreclosure sale if the note holder under the deed of trust was still in default.

A second suit was brought by Cherokee against *inter alia* Cap Ski in federal court on July 6, 1995. The claims included unlawful entry and detainer, unjust enrichment, statutory conspiracy, and tortious interference with a prospective business advantage. This case was dismissed for lack of jurisdiction.

A third suit was then brought by Cap Ski against Cherokee in the Circuit Court of Warren County. On August 7, 1996, the circuit court entered an order granting Cap Ski a

judgment against Cherokee in the amount of $2,736,305.39[1] The Court found Cherokee in default on the deed of trust and granted Cap Ski's motion to move the case to the equity side of the court. J. Daniel Pond II was appointed Special Commissioner for the purpose of selling the property.

On October 4, 1996, Cherokee filed the instant Chapter 11 petition. However, pursuant to the Order from the Warren County Circuit Court, a judicial sale was held on October 5, 1996 by the Special Commissioner. Cap Ski was the successful purchaser at the sale and asserts that it did not become aware of the bankruptcy filing until after the sale had occured. A motion to annul the stay pursuant to 11 U.S.C. § 362 and to validate the sale was filed by Cap Ski on November 18, 1996. A final determination on the motion has been postponed pending the outcome of this adversary proceeding.

On November 12, 1996, Cap Ski filed a proof of claim. On January 6, 1997, the debtor filed an objection to the proof of claim. In the objection, Cherokee asserted that the amounts owed by Cherokee to Cap Ski were not determined with finality and therefore the proof of claim could not be allowed. Cherokee also filed counterclaims. Thereafter, a Revised Objection to Proof of Claim of Capital Skiing Corporation and Counter-Claims was filed on April 3, 1997. The counterclaims were the basis for the trial on December 10, 1997. The initial counterclaims were (1) unlawful detainer/ ejectment; (2) constructive trust/ breach of fiduciary duty/ knowing participation in a breach of trust; (3) negligence, gross negligence, recklessness; (4) unjust enrichment; (5) statutory conspiracy pursuant to Virginia

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[1]After a jury trial and the verdict was returned, the court held that "the real estate taxes paid to Fauquier County in the amount of $2,252.04 and Warren County in the amount of $19,739.10 were paid at a time when Capital Skiing owned the property." August 7, 1996 Order of Warren County Circuit Court in At Law No. 96-000148. The real estate taxes were assessed for the period 1991 through 1993 and paid by Cap Ski on November 30, 1993 and December 13, 1993 respectively.

Code § 18.2-499 and -500/ civil conspiracy; (6) tortious interference with prospective business advantage/ tortious and intentional interference with business relationships; (7) breach of contract/ tortious breach of contract; and (8) punitive damages.

At a hearing on September 17, 1997 this Court dismissed counts 2, 3, and 7 on the grounds that they were barred by *res judicata.* Similarly, at a hearing held on November 18, 1997 this court dismissed count 5 also on the grounds of *res judicata.* The remaining claims are (1) unlawful detainer/ ejectment. (4) unjust enrichment, (6) tortious interference with prospective business advantage/ tortious and intentional interference with business relationships and (8) punitive damages. Additionally, Cherokee claimed at trial that it was alleging a claim of common law conspiracy.[2]

Findings of Fact

The property at issue, the Cherokee Ski Resort, is located in Linden, Virginia with access to the property available by two roads, the Lado Road and the CCC Road. The Lado Road runs over two parcels of land. One parcel is owned by Dr. Lado and the other is owned by the Pickrell family. Cherokee never paid Dr. Lado for use of the road. Further, although it had reached a tentative agreement with the Pickrells to use the Lado Road when the ski resort operated for the ski season of 1990-1991, no land was ever conveyed to Cherokee. Additionally, a final agreement was never reached among the parties to provide Cherokee with an easement over the property to allow use of the Lado Road.

After the foreclosure sale was held on November 30, 1992, "no trespassing" signs were posted on the property, with at least one sign in the vicinity of a chain that was

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[2]We find that regardless of how Cherokee pleads conspiracy, either statutory, civil or common law, this claim is dismissed on the grounds of *res judicata.*

strung across the Lado Road to prevent trespassers. A chain was placed across the entrances to the property on both the Lado Road and the CCC Road to prevent access to the property by trespassers. Chains were also placed across the doors of the ski lodge and a padlock was placed on the pump-house doors.

The record establishes that despite the chains and locks, Cherokee and individuals associated with Cherokee, were able to gain access to the property as testified to by many of Cherokee's witnesses. Several people had entered the property on more than one occasion since the foreclosure sale to inspect the property. Mr. Adkins, the debtor's principal, testified that on four or five occasions after the foreclosure, he was able to gain access to the property, including the lodge, to take pictures and evaluate the damage to the property.

Robert Pickrell was employed by Cap Ski to patrol the property and investigate any damage that may occur on the property. Mr. Pickrell testified that from the period of November 30, 1992 through January 20, 1995, there was some damage to the property. The first instance was when he discovered that someone had broken into the basement with the only damage being a broken window. The second instance was that the pump house door was broken by trespassers. Mr. Pickrell testified that nothing was missing from either break-in. After the foreclosure sale was declared void on January 20, 1995, Mr. Pickrell continued to patrol the property. Cap Ski continued to employ Mr. Pickrell to patrol the property in order to protect Cap Ski's interest in the property. Mr. Pickrell did not remove the chain across the Lado Road even after January 20, 1995.

It was established that there was substantial damage to the property at some time after November 30, 1992 but prior to the trial in this case. However, the uncontroverted testimony of Mr. Pickrell is that the majority of the damage occurred after January 20, 1995 with the only damage occurring prior to January 20, 1995 being the broken

window in the basement and the broken door to the pump house.

The record also establishes conclusively that the foreclosure sale held on November 30, 1992 was declared void on January 20, 1995. The sale was voided by the Circuit Court of Warren County for the reasons stated in its letter opinion dated January 11, 1995 when an issue arose as to whether Lucy O'Bannon had a claim against the property. The court indicated that the trustee had an obligation to "clear the claim through the courts to assure good title to Cherokee under the deed of trust." The Trustee did not clear up the title or resolve the claim to the property prior to conducting the sale and therefore, the court declared the sale void. The January 20, 1995 decree ordered that title revert to Cherokee and that if Cherokee was still in default on the note to Cap Ski that Cap Ski could conduct another foreclosure sale.

Conclusions of Law

1. *Unlawful Detainer*

Cherokee argues that Cap Ski is liable for the wrongful withholding and destruction of Cherokee's property. Additionally, Cherokee asserts itself as the rightful owner of the property because the foreclosure sale had been adjudicated unlawful by the Circuit Court of Warren County. Cherokee alleges that Cap Ski unlawfully detained the property without its consent or permission. Cherokee also asserts that the decree deemed Cap Ski's possession of the property wrongful and therefore Cap Ski is liable for unlawfully detaining the property. As a consequence of the unlawful detainer, Cherokee argues that it is entitled to an order of ejectment pursuant to Virginia Code § 8.01-131 through § 8.01-178 and damages totaling $7,003,000.00.

Cap Ski responded by asserting that it had legal title and lawful possession of the property upon the receipt of the

trustee's deed from the sale that took place on November 30, 1992. Therefore, Cap Ski claims that it cannot be held responsible for damages during this period. Furthermore, in any event, Cherokee cannot prove that the damages were committed while Cap Ski possessed the property or that the damage was done by a Cap Ski employee or agent. Cap Ski counters that Cherokee's argument that Cap Ski's possession was wrongful or unlawful must be also dismissed. The letter opinion and decree of the state court proceedings found that the sale was void and should be set aside, and the property should revert to Cherokee. However, the court made no determination that Cap Ski's holding of the property was unlawful.

The Virginia Code provides for a judgment after a finding or unlawful entry and detainer.
The statute provides:

> If any forcible or unlawful entry be made upon lands, or if, when the entry is lawful and peaceable, the tenant shall detain the possession of land after the right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right of title he had thereto, or the party against whom such possession is unlawfully detained may file a motion for judgment...alleging that the defendant is in possession and unlawfully withholds from the plaintiff the premises in question.

Va. Code § 8.01-124

In order to maintain a cause of action for unlawful detainer, Cherokee must prove that Cap Ski forcibly or unlawfully entered the land, maintained possession of the land without a right to do so, without Cherokee's consent and

withheld possession from Cherokee. Daily v. Rucker, 151 Va. 72, 77-78, 144 S.E. 466, 467-68 (1928) (stating "[t]he remedy for a forcible or unlawful entry or detainer was designed to protect the actual possession, whether rightful or wrongful. . . . if the defendant enter unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right to of possession"). The determination as to whether the holding was unlawful does not require a finding that Cap Ski had proper title to the property. Davis v. Mayo, 82 Va. 97, 99 (1886). The issue of proper title is separate and independent of a determination of lawful possession in a cause of action for unlawful detainer, Pannill v. Coles, 81 Va. 380, 387 (1886), because the purpose of a cause of action for unlawful detainer is to protect the actual possession of the property. Town of Grundy v. Goff, 191 Va. 148, 160, 60 S.E. 273, 278 (1950). The cause of action requires the court to determine whether the possession is "rightful or wrongful [as] against the unlawful invasion and to afford summary redress and restitution." Id. (citing Southern Ry Co. v. Lima Wood, 156 Va. 829, 159 S.E. 69 (1931); Davis v. Mayo, 82 Va. 97, 99 (1886); Olinger v. Shepard, 12 Gratt (53 Va.) 462 (1855)).

Case law is unclear on the issue of whether the purchaser of property at a trustee's auction is vested with proper title during the period before the sale is later invalidated because it was not properly conducted. However, proper title is irrelevant to a claim of unlawful detainer because, lawful possession of property is the only issue to be determined in a claim for unlawful detainer.

We conclude that by virtue of the trustee's sale Cap Ski had a right to possess the property until the sale was invalidated on January 20, 1995. Cherokee has not proven that Cap Ski unlawfully held the property as against Cherokee because Cap Ski rightfully possessed the property.

We now examine what Cap Ski was vested with after the trustee's sale. Cap Ski possessed a trustee's deed and took as a bona fide purchaser without knowledge of any improper

conduct by the trustee. During the period from November 1992 through January 1995, the sale had not been invalidated and Cap Ski had control of the property pursuant to the sale. Once the property reverted to Cherokee after the sale was deemed void, Cap Ski could no longer rightfully exercise control over the property.

Cherokee claims that it is entitled to recover for the damage to the lodge and ski resort property while in Cap Ski's possession. However, Mr. Pickrell testified that there had only been minimal damage to the property from November 1992 through January 1995 and that the substantial damage that did take place was committed after the sale was voided and the title reverted to Cherokee. Cherokee failed to submit any evidence to show that the damages complained of at trial were committed when Cap Ski lawfully possessed the property and failed to submit evidence to refute Mr. Pickrell's testimony. Mr. Pickrell's uncontradicted testimony was credible and must be taken as true. We must conclude that the damages occurred after it was decided that Cap Ski no longer rightfully possessed the property. As such, until the sale was invalidated, Cap Ski had a right to possess the property and to prevent anyone from trespassing on the land. Accordingly, the claim for unlawful detainer for the period of time that Cap Ski held the property after the foreclosure sale on November 30, 1992 until the sale was invalidated on January 20, 1995, is denied.

With respect to the time period after the sale was deemed void until the sale on October 5, 1996, it is clear that Cap Ski did not have title or a right to possess the property. To support a cause of action for unlawful detainer for this period of time where Cap Ski knew it did not have lawful posssession, Cherokee must prove that Cap Ski had possession of the property and prevented Cherokee from regaining possession.

It was established that Cap Ski exercised minimal control over the property simply to protect its interest. This control was in the form of the continuing employment of Mr.

Pickrell to patrol the property, leaving the no trespassing signs posted, keeping the lodge doors and pump house door locked, and paying the taxes and insurance. There is no assertion or proof that this conduct is unlawful nor did it prevent individuals from entering the property.

In fact, Cherokee was never prevented from entering the property. Several people testified that a chain was erected across the roads at each entrance to the ski resort to obstruct entry onto the property after the sale in November 1992. This chain remained on the Lado Road that provides access to the property, and there were no trespassing signs posted on the property with the address of Cap Ski listed on the signs.[3] However, these steps clearly did not prevent Cherokee employees or witnesses for Cherokee at the various trials from entering and inspecting the property.

Five of Cherokee's witnesses at trial testified that they had each visited the property and were not denied access to the property by Cap Ski. Mr. Sennott stated that he had been on the property three times since the foreclosure sale; Mr. Ruffner testified that he had entered the property once to conduct an appraisal of the property; and both Mr. Mr. Smith and Mr. Lochner had visited the property twice since November 1992. Mr. Adkins, Cherokee's president, testified that upon the foreclosure sale being held on November 30, 1992 he vacated the premises, that he returned four or five times and was never prevented from going on the property. He further testified that he was aware that Cap Ski had placed padlocks on the doors to the lodge and a chain and lock on the pump house door and chains across the access roads. Nevertheless, he was able to go onto the property, take pictures of both the outside and inside of the lodge and other areas of the ski resort without anyone interfering or directing him to leave.

At no point in time did Cherokee request possession or attempt to exercise any control over the property. Such

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[3]A chain was also placed across the CCC Road and remained in place until sometime after July 1996.

conduct will not support a cause of action for unlawful detainer because, *inter alia*, there was no detention of the property from the owner. Accordingly, Cherokee's claim for unlawful detainer for both time period that Cap Ski rightfully held the property and for the time period after the sale was voided is denied.

2. *Unjust Enrichment*

Cherokee is claiming that Cap Ski had the use, enjoyment and benefit of Cherokee's property without payment or reimbursement to Cherokee after November 30, 1992. As such, Cap Ski has been unjustly enriched for the use and enjoyment of Cherokee's property.

In order for Cherokee to prevail in the unjust enrichment action it must prove that (1) a benefit was conferred by Cherokee on Cap Ski; (2) Cap Ski knew of the conferring of the benefit; and (3) Cap Ski accepted or retained the benefit in circumstances that would render it inequitable for Cap Ski to have retained the benefit without paying for its value. Nossen v. Hoy, 750 F.Supp. 740, 744-45 (E.D. Va. 1990); see Provident Life & Accident Insurance Co. v. Waller, 906 F.2d 985, 993 (4th Cir.), cert. denied, 498 U.S. 982 (1990).

Cap Ski argues no proof was adduced at the trial that would establish that Cap Ski ever derived any economic benefit from the property. Cherokee was in default on Cap Ski's deed of trust note from March 31, 1992 and had been in default on its obligations to the mechanic's lienors who were the principals of Cap Ski from mid-1990. From November 30, 1992, Cap Ski stated that in order to protect its interest, it expended money such as by paying the insurance and real estate taxes on the property. Because of these expenditures and the fact that Cap Ski never benefited economically from the property, Cap Ski argues that the claim for unjust enrichment should be denied.

There is no indication that Cherokee conferred a benefit on Cap Ski that it would not be entitled to under the law. Clearly, from November 1992 through January 1995, Cap Ski had lawful possession of the property and would be entitled to benefit from possessing the property. From January 20, 1995 to present there was no evidence presented nor was it argued that Cap Ski actually benefited from the property. Furthermore, we cannot conclude that it would be inequitable for Cap Ski to have retained any benefit that it may have received. As of July 1992, Cherokee was indebted to Cap Ski for over one million dollars and Cap Ski held a deed of trust and note on the property. In order to protect this interest Cap Ski paid for insurance on the property and the real estate taxes that accrued. It also employed Mr. Pickrell to patrol the property at a salary of $1,000 per month. Payment of these expenses without any benefit, defeats Cap Ski's claim for unjust enrichment.

3. *Tortious Interference with Prospective Business Advantages or Business Relationships.*

Cherokee argues that as a result of Cap Ski's wrongful foreclosure sale of the ski resort property, Cherokee's prospective business advantages and business relationships arising from the operation of the ski resort were disrupted. As such, Cherokee asserts that it was damaged in an amount of five million dollars ($5,000,000.00).

Cap Ski contends that the foreclosure sale that was declared void was the sole act alleged in the counterclaim to provide the factual basis for the business advantage alleged to have been lost. It is asserted that Cherokee did not provide documents in discovery or any evidence at trial that identify an act or a contract that formed the factual basis for the claim.

Courts have listed the elements of a prima facie case of tortious interference with prospective business advantages

and relationships as (1) The existence of a valid business expectancy with a probability of a future economic profit; (2) Defendant's knowledge of the expectancy; (3) A reasonable certainty that absent the defendant's misconduct, the plaintiff would have realized the expectancy; and (4) Damage to the plaintiff. Commercial Business Systems, Inc. v. Halifax, 253 Va. 292, 302, 484 S.E.2d 892, 987 (1997) (quoting Glass v. Glass, 228 Va. 39, 321 S.E.2d 69 (1984)); see Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97 (1985)).

In the case at bar, Cherokee has failed to prove any of the elements required for a prima facie case of tortious interference with business expectancy. It has not established that it had a valid expectation of business with a probability of a future economic profit. Mr. Adkins testified that in 1992, Cherokee did not have any money. It was also proven that there were no documents produced or offered at trial to support any claim that it would have earned a profit but for Cap Ski's conduct. Cherokee was not operating a business, was insolvent and did not prove that it had an ongoing or prospective business relationship. Therefore, we must conclude that Cherokee would no longer be able to conduct business or realize a profit in the future.

Second, Cherokee did not prove that Cap Ski knew of the business expectancy. In fact, the record is void of evidence that the business would have gone forward even if the sale had not been conducted.

Third, Cherokee did not establish that without Cap Ski's intentional misconduct, Cherokee would have realized its expectation. There were no actions taken by Cap Ski that were intentional and wrongful, Cap Ski merely exercised its right to conduct a foreclosure sale.

Finally, Cherokee did not prove that it incurred damages as a result of Cap Ski's misconduct. To establish this claim, the misconduct must be intentional and it must be proven with reasonable certainty that without the interference Cherokee would have realized its expectation to continue with the business. Here, there is no indication that

the plaintiff's business would continue or that Cap Ski's conduct interfered with Cherokee's business. Further, Cap Ski's conduct of going forward with a foreclosure sale and taking control of the property was not improper nor was it intended to interfere with the plaintiff's business. Accordingly, the claim for tortious interference with a prospective business advantage or business relationship should be denied.

CONCLUSION

Cherokee's claims for damages resulting from lawful detainer, unjust enrichment and tortious interference with prospective business advantage/ tortious and intentional interference with business relationships and for punitive damages are hereby denied. A separate order will be entered consistent with this opinion.

Date: 7/1/98

/s/
MARTIN V. B. BOSTETTER, JR.
CHIEF JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CHEROKEE CORPORATION OF LINDEN, VIRGINIA, INC., Debtor.	)	Case No. 96-15445
	)	Chapter 11
CHEROKEE CORPORATION OF LINDEN, INC. Plaintiff,	)	Adversary No. 97-1002
v.	)	
CAPITAL SKIING CORPORATION, Defendant.	)	Hon. Martin V. B. Bostetter, Jr. Chief Judge

ENTERED: July 1, 1998

ORDER

At ALEXANDRIA, in said district, this 1st day of July, 1998.

For the reasons set forth in the Memorandum Opinion dated the 1st day of July, 1998, and entered therein, IT IS HEREBY ORDERED:

1. The counterclaims of Cherokee Corporation of Linden, Virginia, Inc. against Capital Skiing Corporation for unlawful detainer, unjust enrichment, tortious interference with prospective business advantage/ tortious and intentional interference with business relationships and punitive damages are denied.

2. The Clerk shall transmit via first-class mail a copy of this order to (1) John C. Morgan, Jr., Esq., The Kirby Building, 65 Culpeper Street, Suite 101, Warrenton,

Virginia 20186 (counsel for the debtor/plaintiff); (2) John T. Donelan, Esq., 125 South Royal Street, Alexandria, Virginia 22314 (counsel for the defendant).

Date: 7/1/98

/s/
MARVIN V. B. BOSTETTER, JR.
Chief Judge

NOTICE OF JUDGMENT OR ORDER
Entered On Docket 7/8/98

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 22, 1999

No. 98-2809
CA-98-1146-A
BK-96-15445-MVB

In Re: CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.
Debtor

CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.

Plaintiff - Appellant

v.

CAPITAL SKIING CORPORATION

Defendant - Appellee

ENTERED: November 22, 1999

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

EXHIBIT M

VIRGINIA:

IN THE CIRCUIT COURT OF WARREN COUNTY

CHEROKEE CORPORATION, TRUSTEE, et al.,)
)
Plaintiffs,)
)
CHICAGO TITLE INSURANCE COMPANY, et al.,)
)
Defendants.)

Law No. L93000228

ENTERED: January 20, 1995

FINAL ORDER

UPON CONSIDERATION of the record herein and the suggestion of Chicago Title Insurance Company ("Chicago Title") that this action has become moot because of this Court's final decision in Cherokee Corporation, Trustee v. James A. Drown, Trustee, Chancery No. _____, all petitions for appeal of that decision having been denied by the Virginia Supreme Court; and

IT APPEARING that the Plaintiff has not responded to the Court's letter, dated November 28, 1995, wherein the Court asked all parties to state their position on Chicago Title's suggestion that this action should be dismissed as moot; and

IT APPEARING that all of the parties except the Plaintiff have consented to this Order, as evidenced by the signature of their undersigned counsel; and

IT APPEARING that counsel for Chicago Title gave Plaintiff's counsel proper notice that this Order would be

presented for entry on January 25, 1996 at 1:00 p.m., and that the Plaintiff's counsel did not appear at that date and time to oppose the entry of this Order; and

It is further ADJUDGED, ORDERED and DECREED that the letter opinion of the chancellor dated January 11, 1995 and the letter opinion of January 20, 1995 are incorporated by reference into this decree.

The Motion for Reconsideration is denied.

And this cause on the equity side of the court is ended.

Endorsement of this decree is dispensed with.

ENTER: /s/_____
Judge Designate

DATE: 1-20-95

VIRGINIA: IN THE CIRCUIT COURT OF WARREN COUNTY

CHEROKEE OF LINDEN, VIRGINIA, INC.

v. In Chancery No._____
(A/K/A Law No. 93000228)

JAMES A. DROWN, SUBSTITUTE TRUSTEE
and
CAPITAL SKIING CORPORATION

DECREE

This cause came before the Court on the motion of Cherokee of Linden, Virginia, Inc. requesting relief in its Motion for Judgment that the Court declare void the conveyance of the appropriate 1,050 acres of real estate near Linden, Virginia; after orders entered on October 11, 1994 and December 9, 1994, transferring the claims against James A. Drown, Substitute Trustee and Capital Skiing Corporation to the equity side of the court; upon hearing ore tenus on January 5, 1995; upon the Motion for Reconsideration filed by Capital Skiing Corporation; and was argued by counsel.

Upon consideration whereof, it is ADJUDGED, ORDERED and DECREED that the conveyance to Capital Skiing Corporation by reason of the foreclosure sale conducted on November 30, 1992 be, and it hereby is, declared void and title to said property shall revert to Cherokee of Linden, Virginia, Inc. with authority of the Substitute Trustee to readvertise and conduct another foreclosure sale if the note holder under the deed of trust is still in default.

(2)

No. 99-1412

Supreme Court, U.S.
FILED
MAR 2 4 2000
CLERK

In The
Supreme Court of the United States

In Re: CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.,
Debtor,

CHEROKEE CORPORATION OF LINDEN, VIRGINIA, Inc.
Petitioner,

v.

CAPITAL SKIING CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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11PP

QUESTIONS PRESENTED

Whether the Fourth Circuit Court of Appeals erred in upholding the decision of the United States District Court for the Eastern District of Virginia, Alexandria Division upholding the decision of the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division failing to accord full faith and credit to a decision of the Warren County Circuit Court holding a foreclosure sale void.

Whether the Fourth Circuit Court of Appeals erred in upholding the decision of the United States District Court for the Eastern District of Virginia, Alexandria Division upholding the decision of the United States Bankruptcy Court for the Eastern District of Virginia, Alexandria Division finding that Appellee's "title" was superior to the Appellant even though the Appellee was holding title through a void foreclosure and denying all damages as a result of this wrongful possession that put Appellant out of business.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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JURISDICTION

Review on *Writ of Certiorari* is a matter of judicial discretion and will be granted for compelling reasons only. The petitioner has given no compelling reason to justify this Court's exercise of its discretionary jurisdiction.

This petition does not involve a conflict among federal courts, a conflict among state courts of last resort involving a federal question, or the decision of a state court or a United States court of appeals on an important question of federal law which should be settled by this Court, or conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

This petition seeks this Court's review of the Fourth Circuit's opinion sitting *en banc*, affirming a judgment of the district court which affirmed a decision rendered by the bankruptcy court in favor of Capital Skiing Corporation, "Capski". This decision denied Cherokee Corporation of Linden, Virginia, Inc.'s, "Cherokee", claims for unlawful detainer, unjust enrichment, and tortious interference with prospective business advantages or business relationships and punitive damages.

A. Procedural History

A full procedural history of this case was included in Cherokee's Petition for *Writ of Certiorari* pages App. 5-8 and is incorporated herein.

B. The Dispute

Cherokee asserts that the Fourth Circuit denied its claims because it failed to accord full faith and credit to a decision of the Warren County Circuit Court holding a foreclosure sale void. This failure allegedly caused the Fourth Circuit to uphold the bankruptcy court's dismissal of

Cherokee's claims of unlawful detainer, unjust enrichment, and tortious interference with prospective business advantages or business relationships. Cherokee maintains that had the Fourth Circuit given the Warren County Circuit Court's judgment preclusive effect it would have overruled the bankruptcy court's ruling. This is a non sequitur.

The real issue presented in this petition is whether title to property is relevant to claims of unlawful detainer, unjust enrichment, and tortious interference with prospective business advantages or business relationships.

Capski does not dispute that 28 U.S.C.A. §1738 directs federal courts to give full faith and credit to state court judgments but this precept has no application to this case. The bankruptcy court heard the evidence and made extensive findings of fact and conclusions of law on each of Cherokee's claims. Cherokee does not dispute a single finding of fact. The bankruptcy court's conclusions of law were based on Virginia Code §8.01-124 and Virginia case law. These conclusions of law were affirmed by the district court and the Fourth Circuit Court of Appeals, *en banc* and do not involve a federal question, a conflict among court of appeals, or an important question of federal law that should be decided, or conflict with relevant decisions of the U.S. Supreme Court.

After a full trial on the merits, the bankruptcy court dismissed Cherokee's claims.

1. Unlawful Detainer.

Virginia Code §8.01-124 provides for a judgment after a finding of unlawful entry or detainer. To prevail, Cherokee must prove Capski forcibly or unlawfully maintained the land without a right to do so, without Cherokee's consent, and withheld possession from Cherokee. Because the Warren County Circuit Court held the foreclosure sale was void, Cherokee contends Capski's possession of the property between November 30, 1992 (foreclosure sale date) and January 20, 1995 (void date) was

unlawful. The determination as to whether the holding was unlawful does not require a finding that Capski had proper title to the property, *Davis v. Mayo*, 82 Va. 97, 99 (1886). This cause of action requires the Court to determine that possession is "rightful or wrongful [as] against the unlawful invasion and to afford summary redress and restitution." Citing *Southern Ry Co. v. Lima Wood*, 156 Va. 829, 159 S.E. 69 (1931); *Olinger v. Shepard*, 12 Gratt (53 Va.) 462 (1855). Cherokee chose to prosecute an unlawful detainer action against Capski, not an ejectment action. It is bound by the consequences.

Title to real property is required to maintain a successful ejectment action, but not an action for unlawful detainer. Evidence of title is often inadmissible in trials of unlawful detainer. *Allen v. Gibson*, 25 Va. (4 Rand.) 468 (1826). Virginia case law is unclear whether the purchaser of property at a trustee auction is vested with proper title during the period before the sale is invalidated because it was improperly conducted, but proper title is irrelevant because lawful possession is the issue to be determined in a claim of unlawful detainer (Petition for *Writ of Certiorari,* App. 12), *emphasis added.* At no time did the state court find that Capski's possession was unlawful. (Petition for *Writ of Certiorari,* App. 11)

The bankruptcy court also found that Cherokee did not prove Capski unlawfully held the property between the date the sale was found to be invalid (January 20, 1995) and the date of the second foreclosure (October 5, 1996). The court specifically found that Capski had not prevented Cherokee from regaining possession of the property. Accordingly, Cherokee's claims for unlawful detainer for the time period while Capski rightfully held the property, and for the time period after the sale was voided until the second foreclosure, were denied.

2. *Unjust Enrichment.*

Title to real property is not an element of an unjust enrichment claim. Virginia case law requires proof of three (3) elements. First, Cherokee must show it conferred a benefit to Capski; second, Cherokee must show that Capski knew the benefit was conferred; and third, Cherokee must show that Capski accepted and retained the benefit under circumstances that would render it inequitable for Capski to retain the benefit without paying Cherokee for its value. *Nossen v. Hoy*, 750 F.Supp. 740, 744-45 (E.D. Va. 1990); see *Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985, 993 (4th Cir.), cert. denied, 498 U.S. 982 (1990).

After hearing all the evidence, the bankruptcy court found that Cherokee offered no evidence to prove any of the elements of this claim. Instead, the evidence showed that as of July 1992 Cherokee was indebted to Capski for over one million dollars ($1,000,000.00) and Capski held a Deed of Trust and Note on the property. To protect its interest in the property, Capski paid insurance and real estate property taxes. It also employed a Mr. Pickrell to patrol the property at a salary of $1,000.00 per month. The court held that payment of these expenses without any benefit to Capski defeated Cherokee's claim for unjust enrichment.

3. *Tortious Interference with Prospective Business Advantages or Business Relationships.*

Title to real property is not an element of a tortious interference with prospective business advantages or business relationships claim. To prove this claim, Cherokee must show: (1) the existence of a valid business expectancy with probability of future economic profit; (2) Capski's knowledge of the expectancy; (3) a reasonable certainty that absent Capski's misconduct, Cherokee would have realized the expectancy; and (4) damage to Cherokee. *Commercial*

Business Systems, Inc. v. Halifax, 253 Va. 292, 302, 484 S.E.2d 892, 987 (1997).

The bankruptcy court found that Cherokee was insolvent and was not operating a business. It found there was no evidence the business would have gone forward even if the sale had not been conducted. And it also found no evidence of Capski's misconduct or damage to Cherokee

For these reasons, Cherokee's claim of tortious interference with prospective business advantages or business relations and punitive damages were denied.

REASONS FOR DENYING THE WRIT

Cherokee has given no compelling reason for this Court to exercise its discretionary jurisdiction. There is no split among the circuits. There is no conflict among state courts of last resort involving a federal question. There is no important question of federal law which should be addressed by this Court.

Cherokee claims its *Writ of Certiorari* should be granted because the Fourth Circuit Court of Appeals failed to follow the dictates of 28 U.S.C.A. §1738 directing federal courts not to employ their own rules of *res judicata* in determining the effect of state judgments. Cherokee claims that if the Warren County Circuit Court's judgment holding a foreclosure sale void had been given preclusive effect, the Fourth Circuit Court of Appeals would have overruled the decisions of the bankruptcy court. This argument is a non sequitur. Even if the Fourth Circuit Court of Appeals did fail to follow the dictates of §1738 this fact alone does not prove the *prima facie* elements of Cherokee's claims.

Title to real property is a relevant issue in actions for ejectment. Lawful possession, not proper title, is the gravamen of an unlawful detainer action. Title to real property is not an element of an unjust enrichment claim, or a tortious interference with prospective business advantages or business relationships claim. Therefore, the Warren County Circuit Court's ruling does not in itself prove any of

Cherokee's claims. In addition, the bankruptcy court expressly found that Cherokee offered no evidence at trial to prove the required elements of these claims.

CONCLUSION

This case presents a state law question only. There is no conflict among the circuits and it does not involve an important federal question. For these reasons, this case does not merit further review by this Court and Cherokee's petition should be denied.

Respectfully submitted,

CAPITAL SKIING CORPORATION
By Counsel

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